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No. 243

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1959

IN THE MATTER OF THE ESTATE OF GEORGE W. ROBERTS, DECEASED

LORETTA LOLIAN ROBERTS,

Petitioner,

vs.

FRANKLIN H. ROBERTS and HELEN ROBERTS TRIVAN,

Respondents.

Respondents' Objections to Petition for Writ of Certiorari to the Supreme Court of Montana

ATTORNEY FOR RESPONDENTS
JULIUS J. WUERTHNER,
Great Falls, Montana

JOHN P. WUERTHNER,
Great Falls, Montana
Of Counsel

Filed , 1959

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TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

RESPONDENTS' STATEMENT OF THE CASE

Respondents herein, residing in Ohio, are brother and sister, respectively, of the decedent, George W. Roberts. They were bequeathed legacies by the decedent's will in the amount of $20,000.00 each. Decedent's widow renounced said will and claimed the entire estate. The trial court so decreed and an appeal was lodged in the Supreme Court of Montana.

On March 21, 1958, the Supreme Court of Montana reversed the trial court and held that Respondents were entitled to their legacies as set forth in decedent's will, interest on the legacies and costs on appeal.

Petitioner herein filed a petition for rehearing in the Montana Supreme Court, which affirmed its former decision that Respondents were entitled to their legacies, interest and costs, and, accordingly, denied the petition for rehearing. This decision was handed down on April 29, 1959. The latter decision reached exactly the same conclusion as the former opinion, and was based on the same grounds, but fortified the former opinion with additional authorities.

Subsequently Petitioner made a motion in the Supreme Court of Montana for Recall of Remittitur and for Leave to File Petition for Rehearing. Shortly thereafter the Supreme Court of Montana denied this motion and the instant Petition for Writ of Certiorari followed.

II.

THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO GRANT THE WRIT OF CERTIORARI HEREIN

The jurisdiction of this Court depends on the provisions of 28 U.S.C.A. § 1257.(3) which provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner claims jurisdiction rests upon the alleged failure and refusal of the Supreme Court of Montana to interpret Section 22-107, Revised Codes of Montana, 1947, which statute is as quoted on Page 3 of the Petition for Writ of Certiorari.

Petitioner claims she acquired a vested interest in the estate of her husband upon his death and the decision of the Montana Supreme Court allowing the legacies to Respondents herein, deprived Petitioner of her property without due process of law in violation of the 5th and 14th Amendments of the Constitution.

The jurisdiction of this court is invoked on the basis of the denial by the Montana Supreme Court of Petitioner's Motion to Recall Remittitur and for Leave to File Petition for Rehearing.

There has been no denial of due process of law or violation of the 5th and 14th Amendments of the Constitution

to Petitioner. The provisions of 28 U.S.C.A. § 1257 (3) (supra) require that the right, title, privilege or immunity be *specially* set up or claimed under the constitution. The record before this court is devoid of any reference whatsoever to such constitutional question being presented, except by the Motion to Recall Remittitur and for Leave to File Petition for Rehearing. This Motion was of no force and effect in the Montana Supreme Court proceedings and was in violation of the Rules of the Supreme Court of the State of Montana, 1955.

Rule XV (2) (3) of said Rules provides as follows:

"(2) A petition for rehearing may be presented upon the following grounds and none others: That some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed.

(3) Under the modification of a decision on motion for rehearing, any further petition for rehearing shall be directed only to the modification."

The grounds urged by Petitioner in her Motion for Recall of Remittitur were directed to the fact she was given no opportunity to prepare and file a petition for rehearing, and further that the Supreme Court of Montana refused to construe and interpret the renouncing widow's share in personal property of her husband's estate. It is at once evident Petitioner's motion and attempt at a subsequent petition for rehearing did not relate to the modification of the former decision but was a belated effort to raise an alleged constitutional question and secure a review thereof by this court.

Rule XXI of the Rules of the Supreme Court of the State of Montana, 1955, in part reads as follows:

"Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise, the same shall be issued promptly upon expiration of time for filing petition for rehearing, or if such petition is filed, then upon the denial thereof unless a modification of the decision is made which permits a further petition for rehearing."

As previously stated, the second decision reached the same result and merely fortified the original decision with additional authorities. Hence the remittitur issued forth with because the decision did not permit a second petition for rehearing.

The instant Petition for Writ of Certiorari depends on a determination whether the constitutional question raised on a second attempt to file a petition for rehearing in contravention to the Montana Supreme Court Rules was timely. A host of authorities hold it untimely.

"A claim of federal question first made in an application for leave to file a second petition for rehearing comes too late."

Bilby v. Stewart,
Okl. 1918, 38 S.Ct. 264, 246 U.S. 255, 62 L.Ed. 701;

Rooker v. Fidelity Trust Co.,
Ind. 1923, 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556;

Citizen's Nat. Bank v. Durr,
1921, 42 S.Ct. 15, 257 U.S. 99, 66 L.Ed. 149;

Wall v. Chesapeake Railroad Co.,
1921, 41 S.Ct. 402, 256 U.S. 125, 65 L.Ed. 850.

"Even when the federal question is first presented by a petition for rehearing in the state court, the United

States Supreme Court will not take jurisdiction on certiorari unless that question was thereupon considered and passed on adversely by the state court or the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."

Scott v. Platt,
1943, 137 P.2d 975, 171 Or. 397;

"An attempt to assign new errors in a petition for rehearing in a state court which is overruled without an opinion passing on federal questions cannot avail to import such questions into the record so as to sustain a writ of error from the federal Supreme Court to the state court."

Waters-Pierce Oil Co. v. Texas,
Tex. 1909, 29 S.Ct. 227, 212 U.S. 142, 53 L.Ed. 431;

"A federal question first raised by a petition for rehearing in the highest state court is too late to support the appellant jurisdiction of the federal Supreme Court, where the state court, in denying the petition, made no reference to the federal question."

McMillen v. Ferrum Mining Co.,
Colo. 1905, 25 S.Ct. 533, 197 U.S. 343, 49 L.Ed. 784;

Miller v. Connor,
1913, 215 Mo. 677, 684, 157 S.W. 81 held that:

". . . Constitutional questions could not be injected into a case for the first time in an appellant court by argument or brief of counsel for the purpose of giving jurisdiction."

Petitioner claims the constitutional question herein was raised by her original petition for rehearing as well as the subsequent attempt to file another petition for re-

hearing. In examining the original petition for rehearing, it is utterly devoid of any reference whatsoever to a constitutional question or a denial of due process of law or a violation of the 5th and 14th Amendments. The weak and feeble attempt is made to tie the federal question in with general citations regarding the duty of courts to construe the law, not to insert what has been omitted or to omit what has been inserted. This is grossly insufficient to raise a federal question.

It was impossible for the Supreme Court of Montana to decide the constitutional question here attempted to be injected, as such was never adequately nor concretely presented until the second attempt to file a petition for rehearing in violation of the rules of the Montana Supreme Court. Therefore, the Petitioner's useless attempt to raise a federal question by an improper pleading in the Montana Supreme Court confers no jurisdiction on this court to entertain the instant petition.

III.

THE MONTANA SUPREME COURT DID DETERMINE THE RENOUNCING WIDOW'S SHARE IN THE PERSONAL ESTATE

The Supreme Court decision In the Matter of the Estate of George W. Roberts, Deceased, 338 P.2d 719, ... Mont. ....., decided that upon renunciation no intestacy is created under Section 22-107, R.C.M. 1947, prior to amendment. The decision pointed out that Montana dower statutes were adopted from the State of Illinois.

The Illinois dower statute provides that the renouncing widow is not entitled to all of the personal property of the

testator and an intestacy is not created. The Montana Supreme Court decision in the instant case cites a host of cases from Illinois so holding.

The case of *Kilgore v. Kilgore*, 145 N.E. 754, 319, Ill. 298, held that upon the death of the decedent, his widow acquired no vested right in his estate under the law of descent. Thus, the Petitioner herein acquired no vested right in the estate of her husband under the law of descent. Therefore, she could not be deprived of any right whatsoever in property of her husband in which she had no vested interest. It follows, that having no vested interest, the Montana Supreme Court decision deprived her of no interest, and there could be no violation of the Petitioner's constitutional rights.

A logical conclusion to be reached in applying the reasoning of the Montana Supreme Court decision is that the widow's share in the personal estate is that share which is left after satisfying the legacies, having in mind the size of the estate, debts against the estate and amount of legacies. The Supreme Court of Montana held it was not necessary to decide what Petitioner's share amounts to as this becomes a moot question when no intestacy is created.

It is interesting to note the instant case is the first and only one arising in the Montana Supreme Court under Section 22-107, Revised Codes of Montana, 1947, before that Section was amended in 1955. This court is not disposed to grant writs in petitions involving moot questions in remote and isolated cases.

"To give the Supreme Court jurisdiction of error to state court, mere assertion of a claim in respect of some

constitutional rights is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention."

U. S. Fidelity & Guaranty Co. v. State of Oklahoma,
1919, 39 S.Ct. 399, 250 U.S. 111, 63 L.Ed. 876;

"The mere fact that a state supreme court decides against a party's claim of property or contract right by reversing its earlier decision of the law applicable to such cases, does not deprive him of his property without due process of law, contrary to U.S.C.A. Const. Amend. 14 . . . and this has been so often adjudged by the Supreme Court, that contentions to the contrary are without substance and a writ of error dependent on them must be dismissed for lack of jurisdiction."

Tidal Oil Co. v. Flanagan,
1924, 44 S.Ct. 197, 263 U.S. 444, 68 L.Ed. 382;

"A federal question, although referred to in the assignments of error in the state appellate court and in the federal Supreme Court cannot be considered by the latter, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court."

Cox v. Texas,
Tex. 1906, 26 S.Ct. 671, 202 U. S. 446, 50 L.Ed. 1099;

Where a case is decided on a non-federal question having no relation to a federal question, the United States Supreme Court accepts the decision of the state court, whether right or wrong:

Nickel v. Cole,
Nev. 1921, 41 S.Ct. 467, 256 U.S. 222, 65 L.Ed. 900;

Klinger v. Missouri,
Mo. 1872, 13 Wall 257, 20 L.Ed. 635;

"According to the well settled doctrine of this court

with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

Arkansas Southern R. Co. v. German Nat. Bank, Ark. 1907, 28 S.Ct. 78, 207 U.S. 270, 52 L.Ed. 201;

There are a multitude of decisions from the United States Supreme Court upholding the rule that construction given to a state statute by a state's highest court is binding upon the United States Supreme Court where local law is concerned. State courts have the supreme power to interpret written and unwritten laws of the state. The fact that a state court renders an erroneous decision on a question of state law or a question of state policy, or even overrules principles established by previous decisions relied upon, does not confer appellate jurisdiction on the United States Supreme Court.

Madden v. Commonwealth of Kentucky, 60 S.Ct. 406, 309 U.S. 83, 84 L.Ed. 590;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 1930, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107;

Williams v. Kaiser, Mo. 1945, 65 S.Ct. 363, 323 U.S. 471, 89 L.Ed. 398;

Oklahoma Tax Commission v. Texas Co., 69 S.Ct. 561, 336 U.S. 342;

Patterson v. Colorado,
27 S.Ct. 556, 205 U.S. 454, 51 L.Ed. 879

IV.

THE PETITION FOR A WRIT OF CERTIORARI IS BEING PROSECUTED FOR THE PURPOSE OF DELAYING PROCEEDINGS ON THE JUDGMENT IN THE LOWER COURT

As Respondents have pointed out, this petition is of a frivolous nature, and its purpose is only to delay execution of the judgment in the lower court.

Under Rule 30 of the Supreme Court Rules, where the appeal delays proceedings on the judgment of the lower court and appears to have been sued out merely for delay, damages at a rate not exceeding 10% in addition to interest may be awarded on the amount of the judgment. The instant case is clearly one for the assessment of damages and in this connection Respondents request that such damages be assessed and levied against Petitioner.

By these proceedings Petitioner seeks to further delay the administration of justice and the payment long overdue Respondents of the legacies, and seeks to increase costs which Respondents must incur to defend their rights and secure payment of their judgment. With the filing of the instant proceeding Respondents wonder when litigation is finally at an end.

Also under 28 U.S.C.A. § 1912, when the judgment is affirmed by the Supreme Court this court in its discretion may adjudge to the Respondents just damages for the delay and single or double costs.

V.

CONCLUSION

Respondents have pointed out to this court there is absolutely no basis of ground for the Petition for the Writ of Certiorari, and since no federal question was presented in the lower court this Court has no jurisdiction. The attempt to allege an imaginary violation of constitutional rights by an improper pleading (the second petition for rehearing) is of no avail. This Court will not overturn the solemn decision of the highest court of the State of Montana, which has fully and finally interpreted a state statute. That decision, right or wrong, is not subject to review by this Court.

The Petitioner acquired no vested interest in the estate of her husband at his death and hence the decision does not deprive her of property in violation of the federal constitution. The Montana Supreme Court in construing Section 22-107, Revised Codes of Montana, 1947, suggested if the proper case were presented it would follow the law of Illinois, from whence Montana derived its dower statute, and in the proper case might limit the renouncing widow to 1/3 of the personal estate. The fact that $40,000.00 in legacies were bequeathed out of a personal estate in excess of $300,000.00 makes it apparent that Petitioner is fortunate that the legacies to Respondents were not larger.

This Court having no jurisdiction over the matter which is being prosecuted solely for the purposes of harassment and delay, should deny the petition and assess damages and costs against Petitioner herein, accordingly.

Respectfully Submitted,

s/ Julius J. Wurthner

Attorney for Respondents.

s/ John C. Wurthner

Of Counsel.

Service admitted this 13th day of August 1959

s/ H. Cleveland Hall

Attorney for Petitioner.